DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-211803 **DATE:** July 17, 1984

MATTER OF: OAO Corporation

DIGEST:

1. Protest that contracting agency erroneously determined that Service Contract Act (SCA) applied to certain RFP labor categories is dismissed as untimely. Record shows that contracting agency discussed matter with protester during negotiations and made its interpretation known to all offerors in its request for best and final offers and that protester acquiesced and submitted best and final offer using SCA minimum wage rates. Since protester should have been aware of this basis for protest at the latest when it received request for best and final offer but did not file protest until almost 1 month after submission of that offer, protest is untimely under section 21.2(b)(1) of GAO Bid Protest Procedures. In any event, based upon Department of Labor report on SCA applicability to the RFP labor categories, we cannot conclude that contracting agency's determination that SCA applied was unreasonable at the time determination was made.

2. Protest that contracting agency treated protester and awardee unequally and accepted awardee's proposal even though it did not meet or exceed minimum Service Contract Act (SCA) wages specified in two pertinent wage determinations is denied. RFP, as amended during negotiations, did not indicate that offers had to meet or exceed minimum wages specified in both wage determinations nor did RFP indicate what proportion of work would be performed in geographic areas covered by both wage determinations. Therefore, awardee's proposal which met or exceeded wage rates of primary geographic area was acceptable. Moreover, record shows that protester's proposed rates were below minimum wages of one of the wage determinations in certain labor categories. Finally, whether

awardee performs contract in accord with SCA is matter for Department of Labor.

3. Protest that contracting agency improperly adjusted protester's proposed prices for benchmark tasks upward is untimely. Contracting agency told protester at debriefing that contracting agency believed protester's proposed number of labor hours for benchmark tasks was unreasonably low. Therefore, since labor hours were the major factor making up total benchmark price, protester should have known that agency would also consider its benchmark prices to be unreasonably low, and protest filed more than 10 days after debriefing is untimely. 4 C.F.R. § 21.2(b)(2) (1983). In any event, agency properly adjusted protester's benchmark prices for realism based upon its own "should cost" analysis before deciding which proposal was most advantageous to the government.

4. Protest that contracting agency improperly issued modifications to contract in an effort to grant postaward contract price and cost relief to awardee is dismissed. Record shows that modifications issued were within scope of contract and, therefore, are matters of contract administration.

OAO Corporation (OAO) protests the General Services Administration's (GSA) award of a contract to provide automated data processing support services to Computer Data Systems, Inc. (CDSI), pursuant to request for proposals (RFP) No. KECS-83-002. OAO alleges that GSA required it to base its offer upon Service Contract Act (SCA) minimum wage rates for certain skill categories which are exempt from SCA coverage and that GSA did not require CDSI to abide by the SCA minimum wage rates in the same labor categories. OAO also charges that GSA arbitrarily disregarded OAO's proposed prices for certain benchmark tasks in evaluating proposals and selecting a contractor.

We dismiss the protest in part and deny it in part.

The RFP, a requirements contract for an indefinite quantity of automated data processing technical services,

was issued on December 23, 1982, for a 1-year base period with two 1-year option periods. The solicitation (as amended) indicated that the selected contractor would have to comply with the SCA and contained two relevant wage determinations. GSA was to administer the contract, but the work to be performed would be at the request of various federal user agencies. Upon request by a user agency for services, GSA was to issue a task order to the contractor. The RFP indicated that the size and timing of task orders could not be predicted. However, the RFP specified eight skill categories within which GSA anticipated that services would be required.

Eleven proposals were submitted by the February 14, 1983, closing date, and GSA determined three of the offers to be in the competitive range. During negotiations GSA requested the three offerors to identify seven of the skill categories listed in the RFP to corresponding labor classifications in the wage determinations. GSA and all three offerors agreed that the Technical Writer category was not covered by the wage determinations. OAO's initial proposal did not identify the seven RFP skill categories to corresponding wage determination categories. Therefore, GSA verbally requested on March 25 that OAO clarify its proposal by identifying the skill categories of the RFP to corresponding wage determination categories. In response, OAO submitted a clarification on April 1 which identified five of the RFP's skill categories and showed which wage determination categories applied to each.

Further discussions between GSA and OAO were held between April 12 and April 15 at which time GSA requested clarification from OAO concerning the remaining two RFP skill categories--Office Automation Analyst and Lead/Senior Systems Analyst--and why OAO had not indicated which wage determination categories were applicable to these skill categories. OAO responded on April 15 that, depending upon the specific duties required by a particular task, personnel in each of these skill categories could be exempt from SCA coverage under the "administrative," "professional," or "executive" exemptions from the SCA under Department of Labor (Labor) regulations (29 C.F.R. part 541). OAO indicated that, when employees in these skill categories were peforming SCA-covered duties, they would be paid the applicable minimum wage rates which OAO identified in the

wage determinations. OAO stated that it expected that most tasks performed by these type employees would be exempt from SCA coverage.

On April 18, GSA informed OAO by telephone that it had reviewed the RFP's skill descriptions and determined that OAO's April 15 clarification was unsatisfactory because GSA had determined that none of the RFP skill categories were exempt from SCA coverage. In that telephone call, GSA also informed OAO that, in order to be considered responsive to the pricing provisions of the RFP, OAO must indicate the relationship between each of the seven RFP skill categories, including Office Automation Analyst and Lead/Senior Systems Analyst, and specific wage determination categories. OAO acquiesced to GSA's determination and, by letter of April 19, identified all seven RFP skill categories to wage determination labor categories.

By telephone call of April 20 (confirmed by an undated letter received by OAO on April 21), GSA requested that best and final offers be submitted by April 22. GSA also restated its determination that all direct labor rates for the RFP's skill categories had to comply with the wage determination classifications each offeror had identified previously in their respective clarification letters. The written request for best and final offers also stated,

> "It has been determined that the exemption for employees performing in executive, administrative and professional capacities is not applicable to any of the skill categories identified in the solicitation."

OAO submitted its best and final offer on April 22 and, in accord with GSA's request, calculated wage rates for all seven skill categories on the assumption that no exemptions to the SCA were applicable.

On May 16, OAO filed its initial protest in our Office alleging that GSA required OAO to price its proposal on the incorrect assumption that the SCA was applicable to the first seven RFP skill categories when, in fact, the SCA does not apply to the categories of Office Automation Analyst and Lead/Senior Systems Analyst. GSA awarded the contract to CDSI on May 20.

Concerning OAO's charge that GSA erroneously determined that the SCA was applicable to the skill categories of

Office Automation Analyst and Lead/Senior Systems Analyst, OAO claims that, based upon its experience as the incumbent contractor, it knew that work required under the predecessor contract in these two skill categories was exempt from the minimum wage rate coverage of the SCA. OAO argues that, since this procurement was essentially for the continuation of existing services and would likely require the same type of work, it was apparent that these two RFP skill categories should be exempt from SCA coverage, and it priced its initial offer on the assumption that these positions were exempt. OAO claims that GSA forced it to raise the total price of its offer substantially over the potential 3-year period of the contract by making OAO conform these two skill categories to labor classifications contained in the SCA wage determinations.

GSA and CDSI contend that this issue of OAO's protest is untimely because OAO knew this basis for its protest more than 10 days prior to filing its initial protest in our Office. Alternatively, GSA and CDSI argue that, since the applicability of the SCA had been incorporated into the solicitation during negotiations, OAO should have filed this issue of its protest prior to the closing date for receipt of best and final offers. Since OAO did not file its initial protest until well after the closing date for submission of best and final offers, GSA and CDSI conclude that this issue is untimely. OAO contends that this issue of protest is timely because it was filed on May 16 or just 4 working days after Labor completed an audit to insure that OAO had complied with the SCA under the predecessor contract and Labor concluded that employees in the positions of Office Automation Analyst and Lead/Senior Systems Analyst under the predecessor contract were indeed exempt under the administrative and professional exemptions to the SCA. OAO argues that before completion of the Labor audit it had only a strong belief but no objective legal basis for protest. OAO concludes that, since it protested within 10 days after it learned its basis for protest, this protest issue was timely filed.

We conclude that OAO knew this basis for protest at the latest by April 18 when GSA informed OAO by telephone call that it had reviewed the RFP's skill descriptions in light of the discussions it had had with OAO concerning applicability of the SCA and had determined that the SCA did apply to the skill categories of Office Automation Analyst

and Lead/Senior Systems Analyst contrary to the assertions previously made by OAO. GSA reiterated its position in its written request for best and final offers which was received by OAO on April 21. In effect, GSA had made its interpretation known to all offerors during discussions and had incorporated its interpretation into the solicitation during discussions and in its request for best and final offers. See Federal Data Corporation, B-208237, Apr. 19, 1983, 83-1 C.P.D. ¶ 422. We think it should have been clear to OAO that GSA had not accepted OAO's arguments when GSA insisted that its own interpretation be used in formulating best and final offers. Section 21.2(b)(1) of our Bid Protest Procedures requires that protests based upon alleged improprieties in a negotiated procurement which do not exist in the initial solicitation, but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. part 21 (1983). OAO should have protested GSA's alleged misinterpretation prior to the date set for submission of best and final offers--April 22. Instead, OAO acquiesced and submitted a best and final offer on the basis that the SCA was applicable to the two disputed skill categories. OAO did not protest this issue to either Labor or our Office at any time prior to filing its initial protest in our Office. Therefore, under section 21.2(b)(1) of our Procedures, OAO filed this issue in an untimely manner. See Federal Data Corporation, B-208237, supra.

We do not agree with OAO that it had to wait until Labor ruled on May 10 that the SCA did not apply to similar positions under OAO's predecessor contract to file its protest. While Labor's ruling may have added what OAO believes to be a crucial piece of evidence to its protest argument, we believe that OAO did know its basis for protest on April 18 and was required to file within the time limits prescribed in our Bid Protest Procedures. Compare Atchison Engineering Company, B-208148.5, Aug. 30, 1983, 83-2 C.P.D. ¶ 278, wherein we held that a protester could properly wait until Labor reversed a contracting officer's ruling that the protester was ineligible for award because of its affiliation with a debarred bidder. However, in Atchison Engineering Company, the contracting agency had referred the matter to Labor for resolution and that action could reasonably have been interpreted by the protester to mean that the contracting agency would still consider the

protester eligible if Labor reversed the contracting officer's determination. Here, GSA, unlike the contracting agency in Atchison Engineering Company, did not refer the matter to Labor or in any manner indicate that it would consider changing its interpretation of the SCA applicability.

We also do not agree with OAO that this issue represents a "significant issue" which should be considered by our Office under the timeliness exception of section 21.2(c) of our Procedures. This exception is to be used sparingly--only when the subject matter is of widespread interest to the procurement community and has not been considered previously by our Office. See PRC Government Information Systems, division of Planning Research Corporation, B-203731, Sept. 23, 1982, 82-2 C.P.D. ¶ 261 at 5. We have previously considered protests concerning the SCA rates incorporated into a solicitation, including allegations of ambiguity in the solicitation which could reasonably be intrepreted as requiring different SCA rated employees (See, for example, Transco Security, Inc. of Ohio, B-197177, May 29, 1980, 80-1 C.P.D. ¶ 371), use of an incorrect wage rate (See, for example, High Voltage Maintenance Corp., 56 Comp. Gen. 160 (1976), 76-2 C.P.D. ¶ 473), and the roles to be played by the contracting agency, the Department of Labor, and our Office in deciding the applicability of the SCA to a particular procurement (See, for example, Edwin G. Toomer, B-201969, Sept. 29, 1981, 81-2 C.P.D. ¶ 262). Accordingly, we do not consider the issues raised by OAO to be "significant" within the meaning given to that word in the exception to our timeliness requirements.

In any event, our review of a contracting agency's determination as to the applicability of the SCA is limited to deciding whether the contracting agency's determination was reasonable at the time it was made. See Atchison Engineering Company, B-208148.5, supra, at 5; PRC Government Information Systems, division of Planning Research Corporation, B-203731, supra, at 14; Edwin G. Toomer, B-201969, supra, at 3. Here, we cannot conclude that the GSA's decision that the SCA was applicable to the disputed skill categories was unreasonable when made. We sent OAO's initial protest and related documents to Labor for its opinion on the matter. As the agency which has the primary

responsibility for administering and enforcing the SCA and which conducted the enforcement audit under OAO's predecessor contract, Labor's opinion with regard to the applicability of the SCA to the RFP skill positions and the effect, if any, of its enforcement audit findings on the present procurement are entitled to great weight. High Voltage Maintenance Corp., 56 Comp. Gen. at 164, 76-2 C.P.D. ¶ 473 at 7. Labor responded that:

> ". . . Although the Department of Labor determined that certain individuals classified by the firm as computer analyst/programmer were exempt from SCA coverage under the predecessor contract, such determinations were made on those individuals' employment condition at that time and may not have applicability to performance on the successor contract.
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> ". . . Whether GSA's evaluation of the exempt status of employees working in the challenged classifications is correct cannot be determined until performance actually commences on the contract in question; however, the fact that similar classifications were included on the applicable wage determinations certainly indicates that these employees may be service employees and the Department of Labor has no objection if the contracting agency chooses to treat them a such for the purpose of evaluating proposals."

Basically, it appears that Labor believes that the audit of the predecessor contract may have no bearing on the applicability of the SCA to the skill categories in the present contract. Labor also suggests that there may be merit to GSA's determination that the SCA does apply to the disputed categories, although Labor expressly states that applicability cannot be determined until performance actually commences. Based upon Labor's response, we cannot find that GSA's determination was unreasonable. See PRC Government Information Systems, division of Planning Research Corporation, B-203731, supra, at 15.

OAO also contends that GSA did not treat OAO and CDSI equally. OAO claims that it was required to meet or exceed the minimum wage rates specified in both wage determinations

for each of the RFP skill categories while CDSI was considered acceptable even though its best and final offer only met one of the two minimum wage determination rates for the skill category of Junior Programmer. According to OAO, since CDSI's offer was based solely on one wage determination, GSA has either accepted an offer that is not in compliance with GSA's requirement regarding SCA wage determinations or has imposed a more stringent requirement on OAO than it imposed on CDSI.

Basically, GSA responds that there was no prejudice to OAO because GSA inadvertently waived compliance with both wage determinations for each of the three offerors. In other words, GSA points out that each of the three best and final offers failed to meet the higher of the two minimum wages in at least one of the skill categories. GSA explains that the work to be done under this RFP was to be performed in two different geographic areas. The primary area (within a 75-mile radius of Denver, Colorado) was expected to have the majority of the work and was covered by wage determination No. 79-234, while the secondary area (outside the primary area, but within Colorado, Utah, Wyoming, Montana, North Dakota, and South Dakota) was covered by wage determination No. 75-1003. According to GSA, wage determination No. 79-234 generally had higher minimum wage rates than did wage determination No. 75-1003, and since only one labor rate was to be negotiated per RFP skill category, GSA officials erroneously believed that if an offeror complied with the higher rates of wage determination No. 79-234 that offeror would automatically be in compliance with the rates of wage determination No. 75-1003. Therefore, GSA procurement officials only compared proposed labor rates to the rates of wage determination No. 79-234. However, wage determination No. 79-234 did not specify a rate for the Junior Programmer skill category. GSA admits that CDSI's proposed rate for this skill category is less than the rate specified in wage determination No. 75-1003, but GSA has provided our Office with confidential evaluation materials which show that OAO and the other offeror also failed to meet the higher of the two wage rates in at least one skill category. GSA argues that, since all offerors received equal treatment, and because award was based primarily on technical merit, this error had no substantive effect on the outcome of the selection process and no prejudice resulted.

OAO rebuts the GSA statement that OAO's offered rates were below the minimum rates of wage determination No. 79-234 by explaining that its offered rates were actually weighted average rates computed by assuming that only 80 percent of the work would be performed in the primary area covered by wage determination No. 79-234. OAO argues that this assumption of an 80:20 ratio was valid since neither the RFP nor GSA told offerors what the expected performance ratio would be. Thus, even though OAO admits that its offered weighted average labor rates are below the rates specified by wage determination No. 79-234 in three skill categories, OAO insists that it obligated itself to pay SCA rates and has fully complied with the RFP's requirements.

We have reviewed the RFP and related correspondence, as well as the arguments of all of the parties, and we conclude that CDSI did comply with the RFP's requirements concerning payment of SCA rates. First, the RFP and the request for best and final offers indicate that all direct labor rates must comply with the wage determinations, but, as OAO has pointed out, there is no indication that any specific proportion of the work will be performed in one area or the other. We find nothing to prevent an offeror from using the weighted average approach used by OAO. We also find nothing which specifies that an offeror must meet or exceed the higher of the two wage determination rates. CDSI points out that it based its prices on the primary area wage determination (No. 79-234) rather than the secondary area wage determination (No. 75-1003) because all of its nonexempt employees are in the Denver area. Generally, the rates proposed by CDSI meet or exceed the minimum wage rates of both wage determinations since CDSI's best and final labor rates are based on the consistently higher primary area wage determination. CDSI also explains that since no rate was specified for junior programmers in the Denver area, it arrived at what it believes to be a reasonable rate for this skill category by extrapolating from the minimum wage rates supplied for other labor classifications in the Denver area wage determination. CDSI acknowledges that it is obligated to pay at least the minimum wage rates specified in wage determination No. 75-1003 when it performs in the secondary area.

Since nothing in the RFP or in the record of discussions shows a requirement that the higher of the two wage determinations must be met, we cannot conclude that CDSI is noncompliant in this regard or that offerors have not been treated fairly. Furthermore, we have held that, even where a bidder has proposed rates which are below those specified in the appropriate wage determination, that bidder may be eligible for award as such a bid does not necessarily show an intent to violate the SCA. K & P Incorporated and Kirsch Maintenance Service, Inc., B-212263 et al., Oct. 11, 1983, 83-2 C.P.D. ¶ 436 at 5. Finally, whether CDSI performs this contract in accordance with the SCA is a matter for Labor, which is responsible for enforcement of the act. Starlite Services, Inc., B-210762, Mar. 7, 1983, 83-1 C.P.D. ¶ 229. Accordingly, we deny this portion of OAO's protest.

On October 3, 1983, OAO charged that GSA arbitrarily determined that OAO's benchmark proposals were unrealistically priced and, therefore, did not consider OAO's proposed benchmark prices in the evaluation process. OAO alleges it first learned this basis for protest on September 19 when it received a document from GSA under the Freedom of Information Act which showed how prices were evaluated.

GSA argues that this protest issue is untimely because, at a debriefing held on June 6, OAO was told by GSA procurement officials that its overall score had been reduced because of the low number of labor hours proposed in its proposal to perform certain benchmark tasks. GSA contends that, once OAO knew that GSA believed its labor hours to be unrealistically low on the benchmark tasks and out of line with GSA estimates, it should have known that the corresponding proposed prices for these tasks (which were primarily based upon labor costs) were considered to be unrealistic by GSA. Since OAO did not file its protest on this issue within 10 days of the debriefing, GSA urges that we not consider this issue.

We agree with GSA that this protest issue was filed in an untimely manner. Under our Bid Protest Procedures, a protest must be filed within 10 days after the protester knew or should have known its basis for protest. 4 C.F.R. § 21.2(b)(2) (1983). The record shows that, during

discussions with OAO, GSA officials expressed concern over a number of items in OAO's proposal. Among other things, GSA questioned OAO's proposed number of labor hours on several of the benchmark tasks. Even though OAO attempted to clarify its benchmark proposals, GSA was apparently still concerned when OAO's best and final price to perform the benchmark tasks was extremely far below the prices proposed by the other two offerors which were priced roughly comparably with each other. OAO admits that, at the debriefing, GSA told it that its technical scores in the category of understanding the benchmark had suffered relative to its other technical scores which were at the very highest levels and that OAO's overall score had been reduced because of the proposed low number of hours for the benchmark tasks. In our opinion, while GSA may not have told OAO specifically that GSA believed OAO's benchmark prices to be unreasonably low and, consequently, invalid for evaluation purposes, the relationship between the low number of labor hours proposed to perform the benchmarks and the total price proposed for performing the benchmark tasks is so close that OAO should have been aware of this basis for protest at the latest by the June 6 debriefing. In other words, since GSA told OAO that its proposed number of labor hours was unreasonably low and labor hours is the major factor making up the total benchmark price, it follows that GSA would consider OAO's proposed benchmark price to be unreasonably low. Thus, especially since GSA already had discussed its belief that the number of labor hours was unreasonably low during negotiations, OAO should have been aware of this basis for protest at the latest by the June 6 debriefing conference. Since OAO did not protest within 10 days of that date, this issue of the protest is untimely.

In any event, we have held that, even where a contract is to be awarded on a fixed-price basis, a contracting agency may properly examine proposed prices for realism by performing a "should cost" analysis. Ocean Data Equipment Division of Data Instruments, Inc., B-209776, Sept. 29, 1983, 83-2 C.P.D. ¶ 387. Moreover, the present case has many of the characteristics of a cost-reimbursement contract, even though offers were made on the basis of fixed prices per hour for certain types of labor, due to the fact that the government will pay the contractor varying amounts based upon negotiations for each task order issued and the amount will be computed in large part based upon proposed

man-hours and reimbursable charges. We have consistently stated our view that, generally, some form of price or cost analysis should be made in connection with cost-reimbursement type contracts and offerors' estimated costs should not be considered as controlling since their estimates may not provide valid indicators of the actual cost to the government. See Ecology and Environment, Inc., B-209516, Aug. 23, 1983, 83-2 C.P.D. ¶ 229. We have specifically approved of the use of government man-hour estimates in the evaluation of cost realism and have approved the use of evaluated costs rather than proposed costs for determining the most advantageous proposal. Robert E. Derecktor of Rhode Island, Inc.; Boston Shipyard Corp., B-211922 et al., Feb. 2, 1984, 84-1 C.P.D. ¶ 140 at 11. Such realism determinations are necessarily judgmental in nature, and unless they are clearly unreasonable they are not subject to objection. See, generally, Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 C.P.D. ¶ 325.

In the present procurement, OAO's proposed benchmark prices were approximately 61 percent below the next lowest offeror's benchmark prices. GSA and OAO apparently did not agree that OAO's technical approach to these tasks was adequate, and GSA notified OAO on more than one occasion of its belief that the labor hours proposed were too low. GSA conducted its own "should cost" analysis and adjusted OAO's prices upward accordingly and determined that, when adjusted for realism, all offerors' prices were approximately equal. Finally, since GSA believed prices to be comparable, GSA made award to the offeror with the highest technical scores (technical was stated to be the most important evaluation factor). In these circumstances, we cannot find GSA's analysis of prices and its adjustment for realism to be unreasonable.

The last issue raised by OAO concerns three modifications issued by GSA under the contract awarded to CDSI. OAO contends that these three modifications show that

> "GSA was granting post-award contract price and cost relief to CDSI but, of course, without obtaining the price reductions that such changes would have brought if granted during the competition."

Among other things, these modifications created several new labor skill categories and set forth billing/payment procedures and overtime rate schedules. Aside from alleging that the modifications gave economic relief to CDSI, OAO contends that they support its earlier charge that certain labor categories should have been considered exempt from the SCA.

Basically, the issuance of these amendments is a matter of contract administration, which is the responsibility of the contracting agency, and is not a matter for our consideration. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 C.P.D. ¶ 278. We will, however, review an allegation that the modification went beyond the scope of the original contract and should have been the subject of a new solicitation. Aero-Dri Corporation, B-192274, Oct. 26, 1978, 78-2 C.P.D. ¶ 304. Our examination of these three modifications leads us to conclude that they were indeed within the scope of the contract awarded to CDSI and, accordingly, they are not appropriate for review under our bid protest function. The first modification created a new skill category, "Technical Specialist," and was issued in response to user agency demand for such personnel. Apparently, no existing skill category met the service and personnel requirements of the user agencies in this regard, and hours previously allotted to the Lead/Senior Systems Analyst category were reassigned to this category at the same rate of pay. In our view, this minor change to meet agency needs was clearly within the scope of the contract and such changes could have been anticipated by the original offerors. The second modification, which created the labor skill categories of Programmers and Support Specialists, was subsequently canceled by GSA and, therefore, need not be considered here. The third modification, providing overtime rates and billing/payment procedures, is cited by OAO as support for its earlier charge that the SCA did not apply to the labor skill categories of Office Automation Analyst and Lead/Senior Systems Analyst. Since we found that issue to be untimely, we will not consider this supporting evidence not appropriate for further consideration and is, therefore, dismissed.

We dismiss the protest in part and deny it in part.

for Comptroller General
of the United States